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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1635

THOMAS E. REILLY, JR.,
NELL BETHEL,
JEAN MERRITT,
REMI C. PATTON,
RICHARD ROSENTHAL, Individually
and as members of the Indiana State
Teachers Retirement Fund Board,

Petitioners,

-vs-

MARY F. ROBERTSON,
ESTHER DAVIS,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondents, Mary F. Robertson and Esther Davis, individually and on behalf of all other female teachers in the State of Indiana who are presently teaching as well as those who have retired since July 1, 1972, respectfully pray that this Court deny Petitioner's request for a Writ of Certiorari to review the judgment of the Supreme Court of

Indiana entered in No. 376 S 92 for the reason that this Court lacks jurisdiction because there exists an independent and adequate State ground supporting said judgment of the Indiana Supreme Court, and for the further reason that the judgment of the court below is correct.

OPINION BELOW

The opinion of the Supreme Court of Indiana decided on February 22, 1977, is reported as *Reilly v. Robertson*, ____ Ind. ____, 360 N.E. 2d 171, 56 Ind. Dec. 400 (1977). (See also: Appendix to Petitioners' Brief, p. A-1, hereinafter cited as A-). The opinion of the Vanderburgh Circuit Court, the trial court herein, is unreported and is found in the appendix to Petitioners' Brief. (See p. A-23 and A-24).

JURISDICTION

The Indiana Supreme Court below, in interpreting Indiana Statutes and regulations, invalidated a state agency's plan whereby female teachers in Indiana were paid less than male teachers upon retirement, and specifically held that there had been a violation of the Equal Privileges Clause of Article 1, §23 to the Indiana Constitution. This crystal clear holding based upon the Indiana Constitution by the Indiana Supreme Court is an adequate and independent non-federal ground supporting the judgment below and thus the Petition for Certiorari should be denied for lack of jurisdiction. In its decision, the Indiana Supreme Court specifically wrote that the:

> . . . interpretation of (this) State constitutional provision is an independent judgment of this Court, and in making that judgment, federal cases have only persuasive force. *Reilly v. Robertson, supra*, 360 N.E. 2d at 175. (A-9).

Since the judgment below rested upon an adequate and

independent State ground, which is undisputed in Petitioners' brief, the Petition for Writ of Certiorari should be denied.

QUESTIONS PRESENTED

I. Whether there is an independent and adequate nonfederal ground defeating this Court's jurisdiction when the Indiana Supreme Court below specifically held that its decision was based on the Equal Privileges Clause of Article 1, §23, to the Indiana Constitution; stated that this holding was an independent judgment of that Court; and, specifically discussed the State Constitutional Standard that it was applying.

II. Whether the payment of unequal retirement benefits to male and female retirees based solely upon sex differences, where all other factors are equal, violates the Equal Privileges Clause of Article 1, §23, to the Indiana Constitution.

Alternatively, if this Court overrules I and II above, then:

III. Whether the payment of unequal retirement benefits to male and female retirees based solely upon sex differences, where all other factors are equal, violates the Equal Protection Clause to the Fourteenth Amendment to the Constitution of the United States.

IV. Whether the method of adoption and use of separate tables for the payment of annuity benefits to retired male and female teachers was discriminatory and unconstitutional under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

V. Whether the adoption and application of the 1971 Group Annuity Mortality Tables by the defendant

Board which permits the payment of greater monthly annuities to men than comparable women, all other factors being equal, is a violation of the Supremacy Clause of Article 6, Clause 2, of the Constitution of the United States in that the adoption and application of the 1971 Group Annuity Mortality Tables conflicts with and is pre-empted by 42 U.S.C. §2000e-2 (a) (1).

STATEMENT OF THE CASE

For more than fifty years, teachers in the State of Indiana contributed equal amounts of their salaries and received equal benefits upon retirement. After fifty-one years of equal treatment, the Indiana State Teachers' Retirement Fund Trustees, hereinafter referred to as "Board", (the Petitioner-Appellants herein), began paying lesser annuity benefits to female retirees than to male retirees, effective July 1, 1972, by adopting separate mortality tables for males and females. (R.P. 586) (Plaintiffs' Exhibit 31).

In response to the Boards' action, plaintiff, Mary F. Robertson, instituted this sex discrimination suit on January 2, 1974, in the Vanderburgh Circuit Court as a class action on behalf of herself and all other female teachers in the State of Indiana who are presently teaching, as well as those who have retired since July 1, 1972. Thereafter, Esther Davis, a retired teacher, receiving less benefits than a comparable male retired teacher, intervened as a party plaintiff, individually and for the class of all other retired female teachers who receive less benefits. The suit seeks to enjoin the defendants from using sex segregated mortality tables which result in the payment of unequal amounts to males and females upon retirement, and to recover the difference between the amount received and that which a comparable male retiree had been paid since July 1, 1972.

On April 3, 1975, the Vanderburgh Circuit Court entered judgment for the plaintiffs, made thirty-two Findings of Fact, none controverted herein, and seventeen

Conclusions of Law, and held that the actions of the defendant:

> 1. Violated the Equal Privileges Provisions of Article 1, §23, to the Indiana Constitution; and,
>
> 2. Violated the plaintiffs' Equal Protection and Due Process rights under the Fourteenth Amendment to the Constitution of the United States; and,
>
> 3. Violated the Supremacy Clause of Article 6, Clause 2, of the Constitution of the United States in that the adoption of said tables conflicted with and were preempted by 42 U.S.C. §2000e-2 (a) (1). (A-33 to A-38).

In addition, the lower court concluded that there was no rational basis for the classification for the following reasons:

> a. There are innumerable factors other than sex which influence one's life expectancy, such as weight, health, smoking habits, race, occupation, geographic location, socio-economic class, drinking habits, and hobbies, which the defendant Board has not used. To use only the sex factor and to ignore these innumerable other factors, is arbitrary.
>
> b. The use of group mortality tables attempts to predict only the life expectancy of a group and does not consider the individual female. These tables cannot predict the life expectancy of any particular individual, regardless of sex. Since actuarial tables do not predict the length of any individual's life, any claim that such tables may be used to assure equal pension benefits to males and females over their lifetime, must fail.
>
> c. 82.9% of the female teachers, according to the

tables adopted by the defendant Board, will die at the same identical year of death as 82.9% of the males. Because females are paid less monthly benefits than a male, this means that 82.9% of the females will die having received less than 82.9% of the males who die at the same identical year of death.

d. Providing the male with additional income per month permits the male to live at a higher standard of living, or to purchase more consumables, or to purchase additional entertainment or luxuries, or to invest and accumulate funds for an estate in excess of that received by the female.

e. That the sixty month quarantee plan under A-1 makes it impossible for a female and/or her estate to receive as much as the male and/or his estate, if death occurs on or before the 60th month.

f. That the percentage that the male buying factor exceeds the female buying factor is not constant thereby penalizing the female teacher who retires at age 65 more than one who retires at age 50. The male buying factor at retirement age 50 exceeds the female buying factor by 7.8% whereas at 65 the male buying factor exceeds the female buying factor by 14.3%.

g. A female who retired before July 1, 1972, receives an amount equal to that received by a comparable male, all other factors being equal, whereas a female who retires after July 1, 1972, receives an amount less than a comparable male on a month to month basis, all other factors being equal. (A-34, 35).

An appeal was taken from this final judgment by the Board to the Indiana Court of Appeals. This case was transferred to the Indiana Supreme Court on motion of the respondents under Ind. R. App. P. 4(A) (10).

The Indiana Supreme Court in affirming the judgement of the Vanderburgh Circuit Court specifically held that the action of the Board violated the Equal Privileges Provisions of Article 1 §23 to the Indiana Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Reilly*, supra, 760 N.E. 2d at 177, 179, 180, 181.

REASONS FOR DENYING WRIT

A. THE LOWER COURT EXPRESSLY RELIED UPON THE EQUAL PRIVILEGES CLAUSE OF ARTICLE 1, §23, TO THE INDIANA CONSTITUTION FOR ITS JUDGMENT AND THUS THERE IS NO JURISDICTION BECAUSE THERE IS AN INDEPENDENT AND ADEQUATE STATE GROUND SUPPORTING THE JUDGMENT BELOW.

The Indiana Supreme Court below, in interpreting Indiana Statutes and regulations, invalidated a state agency's plan whereby female teachers in Indiana were paid less than male teachers upon retirement, and specifically held that there had been a violation of the Equal Privileges Clause of Article 1, §23, to the Indiana Constitution:

> ". . .And we finally conclude that the trial court was correct in adjudging that the objective of this pension legislation is not advanced in a manner consistent with either the Equal Protection Clause of the Fourteenth Amendment or the Equal Privileges Clause of the Indiana Constitution by the adoption and application by the Fund of the group annuity mortality table with a five year set-back for females, thereby providing a greater monthly annuity payment to males than females. . . ."

> ". . .In light of the fact that this policy of the Fund has been determined by this tribunal to have been

unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Equal Privileges guarantee of Article 1, §23, of the Indiana Constitution, we deem it unnecessary to consider these further contentions of appellant. . . ."

". . . In all other respects, the judgment of the trial court is affirmed. . . ."

ARTERBURN J. CONCURRING.

". . .I, therefore, concur in the majority opinion affirming the judgment of the trial court . . . ." *Reilly*, supra, 360 N.E. 2d at 177, 179, 180, 181. A-14-17-20-21).

The judgment of the Vanderburgh Circuit Court herein, specifically held:

"IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendant Boards' adoption and application of the 1971 Group Annuity Mortality Tables with a five year setback for females and the establishment of procedures providing for a greater monthly annuity payment to males than females based solely upon sex, is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States."

"IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendant Boards' adoption and application of the 1971 Group Annuity Mortality Tables with a five year setback for females and the establishment of procedures providing for a greater monthly annuity payment to males than females based solely upon sex, is unconstitutional and in violation of Article 1, Section 23, of the Constitution of the State of Indiana." (A-37).

This unequivocal holding based upon the Indiana Constitution by the Indiana Supreme Court is an adequate and independent non-federal ground supporting the judgment below and thus the Petition for Certiorari should be denied. Left totally undiscussed in the Boards' Petition and presumably conceded by the Board is the independence and adequacy of the State ground herein.

The well-settled rule of this Court is that where the judgment of a state court rests upon two grounds, one federal and one non-federal, this Court lacks jurisdiction if the non-federal ground is independent and adequate to support the judgment. *MURDOCK v. CITY OF MEMPHIS*, (U.S. 1875), 20 Wall. 590, 22 L.Ed. 429; *FOX FILM CORP. v. MULLER*, (1935), 296 U.S. 207, 80 L.Ed. 158, 56 S. Ct. 183; *MINNESOTA v. NATIONAL TEA CO.* (1940), 309 U.S. 551, 84 L.Ed. 920, 60 S. Ct. 679. This rule has been uniformly followed at least as early as *KLINGER v. MISSOURI* (U.S. 1873), 13 Wall. 257, 263, 20 L.Ed. 635.

It is undisputed in the Board's Petition for Writ of Certiorari that the Indiana Supreme Court clearly based its holding upon the Equal Privileges Clause of Article 1, §23, to the Indiana Constitution as well as upon the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. It has long been clear that even though a state court's opinion relies on similar provisions of both state and federal constitutions, the state constitutional provision provides an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment. *JANKOVICH v. INDIANA TOLL ROAD COMMISSION*, (1965), 379 U.S. 487, 13 L.Ed. 2d 439, 85 S. Ct. 493.

In *JANKOVICH*, this Court discussed a similar situation posed by similar provisions of the Indiana and Federal Constitutions and wrote:

"In such circumstances, even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitu-

tional provisions has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment. 397 U.S. at 492. See also: *NEW YORK CITY v. CENTRAL SAVINGS BANK*, (1939) 306 U.S. 661, 59 S.Ct. 790, 83 L.Ed. 1058 and *LYNCH v. PEOPLE OF NEW YORK, ex. rel PIERSON*, (1934) 293 U.S. 52, 55 S. Ct. 16, 79 L.Ed. 191.

Moreover, this case has a much more independent and adequate ground than the *JANKOVICH* decision because the Indiana Supreme Court and the Vanderburgh Circuit Court herein both expressly held that the action of the Board herein violated the Equal Privileges Clause of the Indiana Constitution as well as the Equal Protection Clause of the Federal Constitution. In *JANKOVICH*, the grourds for the decision of the Indiana Supreme Court were not so clear. *JANKOVICH v. INDIANA TOLL ROAD COMMISSION*, 379 U.S. at 495. (Justice Black dissenting).

Besides the crystal clear holding of the Indiana Supreme Court, it expressly stated:

> "Our interpretation of a state constitutional provision is an independent judicial act of this Court, and in making that judgment, federal cases have only persuasive force." *REILLY v. ROBERTSON*, ____Ind.____, 360 N.E.2d 171, 175 (1977) (A-9).

The Indiana Supreme Court then cited *MIDWESTERN PETROLEUM CORP. v. STATE BOARD OF TAX COMMISSIONERS*, (1933), 206 Ind. 688, 187 N.E 882 for this position.

It has been long recognized in Indiana that it is the province of the Indiana Courts to interpret and apply the provisions of its constitution and when interpreting and applying these provisions, it's decision is an independent judicial act of that Court. *SPERRY & HUTCHINSON CO. v. STATE* (1919), 188 Ind. 173, 122 N.E. 584; *MIDWESTERN PETROLEUM CORP. v. STATE BOARD OF TAX COMMISSIONERS*, (1933), 206 Ind. 688, 187 N.E. 882, *DEPARTMENT OF INSURANCE v. SCHOONOVER* (1947), 225 Ind. 187, 72 N.E.2d 747. These same decisions have held that even where the United States Supreme Court has adjudicated the exact same issue under a similar constitutional provision, that it was not bound by this interpretation in interpreting and in applying the Indiana Constitution. For example, in *MIDWESTERN PETROLEUM CORP., supra*, the appellant therein was challenging the constitutionality of a statute under Section 23 of Article 1 to the Indiana Constitution - the same provision involved herein-which had previously been upheld by the United States Supreme Court under the Equal Protection Clause of the United States Constitution. Despite this prior decision adjudging the Equal Protection claim by the United States Supreme Court, the Indiana Supreme Court made an independent assessment and analysis of the Equal Privileges Clause argument and wrote:

> "It is the province and duty of this Court to interpret and apply the provisions of the Constitution of this state. Where a provision of our Constitution is similar in meaning and application to a provision of the Federal Constitution, it is desirable that there should be no conflict between the decisions of this Court and the Supreme Court of the United States upon this subject. A decision of the latter Court sustaining the validity of a statute of this state as not offending against the Fourteenth Amendment of the Federal Constitution is not binding on this Court when the statute is attacked as offending against the provisions of the State constitution having the same effect. But such a decision of that high and respected tribunal is strongly persusasive authority." *Midwestern Petroleum Corp., supra*, 187 N.E. at 883.

This same process was followed in *DEPARTMENT OF INSURANCE v. SCHOONOVER, supra.*

In light of this history, in light of the express language in the decision below that the Court was making an independent adjudication of the Equal Privilege Claim, and in light of the fact that the Court below devoted an entire section of its Opinion to the State Constitutional Standard, it is ludicrous to assert that there is not an adequate State ground for the decision below.

The statement by the petitioners herein at p. 17 of their brief that the Indiana Supreme Court relied exclusively on cases from this Court is a complete misrepresentation of the opinion below. In fact, the decision below cited the two leading sex-discrimination cases in Indiana, *i.e., HAAS v. SOUTH BEND COMMUNITY SCHOOL CORP.*, (1972), 259 Ind. 515, 289 N.E.2d 495, and *INDIANA HIGH SCHOOL ATHLETIC ASSOCIATION v. RAIKE*, (1975) _____ Ind. App. _____, 329 N.E.2d 66; and also discussed other cases which have set the standard in Article 1, §23 cases. *PHILLIPS v. OFFICIALS OF CITY OF VALPARAISO*, (1954), 233 Ind. 414, 120 N.E.2d 398; *MIDWESTERN PETROLEUM CORP. v. STATE BOARD OF TAX COMMISSIONERS* (1933), 206 Ind. 688, 187 N.E. 882. It is simply disingenuous to argue that the Indiana Court relied exclusively on cases of this Court. In its opinion, the Indiana Supreme Court merely distinguished federal cases cited to them by the Petitioners in its' brief below. What the Petitioners misapprehend is that the appeal herein is from the judgment below, not the opinion below; the "power of this Court is to correct wrong judgments, not to revise opinions." *HERB v. PITCAIRN*, (1945) 324 U.S. at 126, 127, 65 S. Ct. 459, 89 L.Ed. 789.

In the instant case there is no ambiguity as to the Court's holding nor is there any claim that there was any compulsion upon the Indiana Supreme Court in reaching its decision. This Court has long respected judgments resting on adequate state grounds and refrained from writing advisory opinions on federal law in these type of cases. Justice Jackson's oft cited remarks in *HERB v. PITCAIRN*, 324 U.S. 188, 65 S. Ct. 459, 89 L.Ed. 789, are as important today to the principle of federalism as they were when they were written:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. The reason is so obvious that it has rarely been though to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal law, our review could amount to nothing more than an advisory opinion." 324 U.S. at 125, 126.

Whether the issue in this case is of "utmost importance . . . in other states and federal government" (Petition at 17), may be an interesting theoretical question, but that does not convert this case into an appropriate vehicle for excursion into a "newly developing area." Courts are constantly aware of, or are faced with an opportunity to venture into new and unique questions of law. However, exploration into those areas must await appropriate cases in which the judgment below meets the Courts' jurisdictional standards for reviewability.

B. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED FOR THE FURTHER REASON THAT THE DECISION BELOW WAS CORRECT.

Whatever Constitutional Standard is utilized *i.e.* the rational basis test, a sex-suspect classification or some intermediate standard, the Board's actions herein are violative of the Respondents' Equal Protection rights under

the Fourteenth Amendment to the United States Constitution and respondents' Equal Privileges rights under Article 1 §23 of the Indiana Constitution.

The Indiana Supreme Court below found the purpose of this Indiana pension legislation, involved herein, to be:

> to provide an incentive to all teachers to remain in teaching as a lifetime career, and to accept the moderate salaries paid teachers, and to forego opportunities in other areas of employment as they may arise. *Reilly v. Robertson, supra,* 360 N.E.2d at 176.

The classification herein based solely upon sex, in light of the purpose, has absolutely no:

> ". . . ground of difference having a fair and substantial relation to the object of the legislation, *so that all persons similarly circumstanced shall be treated alike." REED v. REED,* (1971) 414 U.S. 71, 76, 925 Ct. 251 30 L.Ed. 2d 229. (Emphasis Ours).

The uncontroverted evidence and the Findings of Fact of the Vanderburgh Circuit Court show that by applying the identical tables adopted herein by the Board, to an equal group of males and females, approximately 82.9% of the females will die at the same ages as approximately 82.9% of the males. Because the females receive less monthly annuity payments than the males, approximately 82.9% of the females will never receive as much as approximately 82.9% of the males at the time of their death. When one considers the factor of inflation, the fact that the male can invest the differential, and the fact that many of the females will not live long enough to recoup the differential, the percentage of females who will die receiving less than comparable males is easily over 90%. Stated otherwise, the odds range somewhere between 5-1

and 9-1 that an individual female teacher will die having received less over her lifetime than a comparable male. The plaintiff, Esther Davis, for example, at best has only one chance in five of ever receiving equal benefits over her lifetime as a male who is the same age, has the same date of retirement, and has contributed an equal amount into the retirement fund. In fact, at whatever date of death she may die, she will have received less than all males who die at the same date of death.

No one knows when a particular individual will die. All individuals, therefore, must subsidize each other; and there is no rational reason to single out one sex group over another when in actuality the group is retired teachers. When one can categorize individuals by race, weight, smoking habits, geographic location, occupation, to name only a few, it is arbitrary to single out only sex. As one noted actuary has remarked:

> *"Is not the traditional separation of mortality tables by sex only arbitrary?* While it is known that mortality rates are correlated with sex, it is also true that they are correlated with economic status, occupation, locality, race and several other factors, and yet we seldom make these distinctions in pension work." Anderson, *Social Economic and Political Forces Shaping Pension Plan Design,* 25 Transactions of the Society of Actuaries 509 (March 1973). (Emphasis Ours). See also, Fellers and Jackson *Non-Insured Pension Mortality: The UP - 1984 Table* (May 1975).

Tables suggesting differences in life expectancy based upon race are among the exhibits which the Board relies upon as showing life expectancy differences among the sexes. The Boards' sex-differential arguments could likewise be used to support race differential payments. If said suggestion rankles, its point has been made. The fallacy underlying sex-based annuity tables is that they ignore the fact that each woman is individually distinct.

Sex-based annuity tables discriminate against women since they presuppose that *all* women are inherently different from all men, which is simply wrong.

The sex of a particular teacher has no relationship to the purpose of this Indiana legislation. Each individual teacher must make, by statute, equal contributions, must meet the same qualifying standards, and must retire at the same age. Considering the fact that minimally at least 83% of all the males and females have an identical date of death, it is easily seen that similarly situated individuals have not and will not be equally treated.

This Court has steadfastly protected the rights of women and struck down classifications based solely upon sex under both Equal Protection and Due Process analysis. There is little justification for what the Board has done herein. For 50 years the fund was solvent in paying equal amounts to males and females upon retirement and there is no evidence in the record to support the Board's dire representation to this Court that a unisex table would bankrupt the fund.

C. EVERY COURT PASSING UPON THIS ISSUE HAS REACHED THE SAME RESULT AND INVALIDATED SEX-SEGREGATED TABLES UNDER TITLE VII

Every Court which has decided this question has reached the same result and has invalidated these sex-segregated mortality tables under Title VII of the Civil Rights Act of 1964. *MANHART v. CITY OF LOS ANGELES* (D.C. Cal. 1975), 387 F.Supp. 980, ____F2d ___; *HENDERSON v. STATE OF OREGON* (D.C. 1975), 11 F.E.P. Cases 1218; *FITZPATRICK v. BITZER* (2d Cir. 1975), 390 F.Supp. 378, appealed other grounds 519 F.2d 559; *ROSEN v. PUBLIC SERVICE ELECTRIC & GAS CO.* (3rd Cir. 1969) 309 F.2d 775.

CONCLUSION

Because the Indiana Supreme Court's decision rests upon an adequate and independent non-federal ground and because the decision below is correct, the Respondents herein respectfully request that the petition for Writ of Certiorari be denied.

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